United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1085

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : 77-1085
1094

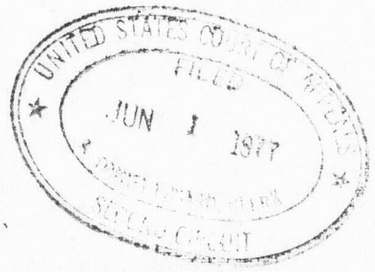
JOSEPH SAMPSON, :

Defendant-Appellant. :

----------x

REPLY BRIEF FOR THE APPELLANT JOSEPH SAMPSON

On Appeal From a Judgment From the United States District Court For The Southern District of New York



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POINT I

THE CONVICTION SHOULD BE REVERSED BECAUSE OF THE MASS NATURE OF THE TRIAL.

The government says that "all appellants seek reversals of their conviction on the ground that the proof at trial showed multiple conspiracies." (GB* p.50).* This is untrue, at the very least as to Joseph Sampson and most likely as to many of the other appellants.

There are two ways of looking at the appellee's bald assertion in the first point of the argument, in a brief that must be deemed important, if only because the Government devotes 72 pages to argument, 10 pages of which are dedicated to this particular charade. The first way is to assign the Government the benefit of the doubt and assume that since most appellants have sought the benefit of Rule 28i, Federal Rules of Appellate Procedure, each considers a multiple conspiracy defense relevant to this case,** atleast in the mind of Government's counsel.

The second way of looking at it, not quite so charitably but probably more accurately, is to recognize that the Government seeks to discredit the real argument designed to appeal to an instinct of essential fairness in the Court and

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*References to the Appellee's brief shall be denoted GB. All quotations and references are to the proof copy served on counsel. At the time of writing of this reply brief the final copy had not yet been received. All other references are the same as in Sampson's original brief.

**All briefs were not exchanged between counsel, due in large part to the costs involved where most attorneys are assigned.

hence the Court's supervisory powers on the mass trial argument. Therefore, in the words of a mixed metaphor, the appellee has raised a stalking horse only to knock it down through ridicule of a non-existent argument.

Counsel for Joseph Sampson agrees that in the light of the law in this Circuit, the jury had a perfect right to find a single conspiracy. (See government brief p.50-59 for citations).

What has been raised is the inherent unfairness of the mass trial. (See brief for appellant Frank Moten). To undermine their attack on what has been the unfortunate practice of the Government in this Circuit in filling the well of large courtrooms with numbers more often associated with military trials in totalitarian regimes, the appellee goes even further and says that this claim is based on "an inaccurate and misleading presentation of the facts", while failing to document its allegation. (GB p.60).

Appellee seeks to bootstrap its argument by demonstrating that part of the pre-trial motion for severence was founded on the defense's notion that the Government would prove more than one conspiracy. Indeed this was the case, but the defense cannot be taxed for its speculation where the Government makes its offer to explain only to the Court its motion of a single conspiracy (GB p.62 fn*).*

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*Considering the number of defendants going to trial, counsel has manfully tried to resist the impulse to call this Catch 22. The impulse, however, was overwhelming.

In fact the defense plan offered to the Court was one based on manageable numbers of defendants where defense counsel sought to divide the trial along rational lines. As nearly as possible, the proposal was along a geographical axis but some cross-over was inevitable, as it pointed out by the appellee.

The Government's reliance on United States v. Stromberg, 268 Fed 256 (2d Cir. 1959) for the proposition that exactly the same proof would have come in at severed trial blinks at the reality that limiting instructions were given on such a regular basis that to index them seems a task equal to inscribing the nine million names of God in the air. Each of those instances would have been held to the severed trial of the group in which the particular defendant found himself had the trial court either adopted or adapted the profferred defense plan.

The appellants ask that this Court finally make good on its promise in United States v. Sperling, 506 Fed 1323, 1340-41 (2d Cir. 1974) and forbid mass trials which have neither the appearance or the reality of fairness.*

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*The Government points to the acquittals of four defendants as evidence of the penetrability of the proceedings from the standpoint of the jury. They concede, however, that the evidence against these defendants was almost non-existent (GB p.20 fn**). A reading of the evidence against O'Dood, for example, should indicate his case should not have been submitted to the jury.

POINT II

THE 1976 SEARCH WAS ILLEGAL

The Government, with a cute tactic boardering on preciousness, lumps all the defendants' claims of error as "Various Claims of Error" which are "Without Merit." As to Joseph Sampson, only the Government's argument as to the 1976 search merits response and this only because the appellee's characterization of the state of the record is inaccurate.

The affidavit of agent Gheen in support of the application for a search warrant says in pertinent part:

> ". . . observed in plain view a marihuana [sic] smoking pipe with suspected marihuana [sic], and marihuana [sic] residues contained inside the bowl of the pipe. . ." [Emphasis added] (SA-17).

Any person who reads this affidavit must assume it means what it says under generally accepted rules of grammer. The fact that the writer placed a comma between marijuana and the marijuana residue inside the bowl of the pipe indicates that there are two different substances in two different places.

Appellee, it seems, complains of the fact that counsel for Joseph Sampson, in preparing the motion assumed that the affidavit meant what it said and therefore assumed that the agent saw the pipe, with ashes in it, and a material also in plain view not in the pipe which he, in her expertise could determine to be marijuana.

When the evidence at the hearing failed to mesh with the affidavit, and showed instead that there was no marijuana,

but merely the scrapings from inside the pipe, the grounds for the motion shifted to no probable cause for seizing material in plain view in addition to the grounds already stated. Appellee seems to complain that the Government attorney could not follow the evidence, and was sandbagged. Appellee further appears to feel that where the record does not support the Government, counsel for a defendant in a hearing should protect the Government's record by giving a police agent an opportunity to sanitize his testimony.

That job, in any adversary proceeding, belongs to the adversary. The Government had an opportunity to recall Agent Gheen which it declined. (H 131, 134). The Court accepted in terms the factual base that what was found was a pipe with residue in it.

> "THE COURT: I am prepared to find on this record that there was probable cause for this Officer to pick up this pipe as a marijuana pipe containing marijuana residue and taking it away and thereafter be confirmed in the findings that it, in fact, contained marijuana." (H 134).

Even the Government seemed, upon hearing the evidence, to accept that proposition.

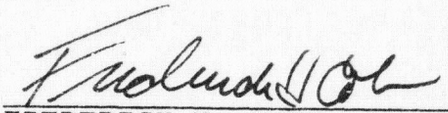
> "MR. SEAR: all we are getting now is testimony from counsel to the effect that this witness could not recognize a pipe with marijuana residue. It turns out he did." (H 132).

The Government was arguing that the results justified the seizure but no string of citation is needed to point out to this Court that this is not the law. The Government, having failed to recall Gheen, should be held to the same level of foresight as defense counsel that neglects an issue. Based on the evidence at the hearing, the seizure was without probable cause and the fruits of the subsequent search should be suppressed.

CONCLUSION

THE CONVICTION OF JOSEPH SAMPSON SHOULD BE REVERSED.

Respectfully submitted,



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